

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RONNIE B. TUDOR,
Plaintiff,
v.

No. C 11-5362 CW
ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS

UNITED STATES DEPARTMENT OF THE
NAVY, et al.,
Defendants.

_____/

Defendants the United States Department of the Navy, the Hon. Ray Mabus, the Secretary of the Navy, and Josie Dristy, the Debarring Official for the Department of the Navy, have filed a motion to dismiss Plaintiff Ronnie B. Tudor's First Amended Complaint (1AC). Plaintiff opposes the motion. The matter was decided on the papers. Having considered all of the papers filed by the parties and the record in this case, the Court grants Defendants' motion.

BACKGROUND

I. Regulatory Background

The parties' dispute involves contracting between private entities and the government. Such contracting is governed by the Federal Acquisition Regulations (FAR) at Title 48, Part 9 of the

1 Code of Federal Regulations. Pursuant to these regulations, "No
2 purchase or award [of a contract] shall be made unless the
3 contracting officer makes an affirmative determination of
4 responsibility" of the prospective contractor. 48 C.F.R.
5 § 9.103(b). Debarment is the process by which an agency can
6 declare that a contractor is presumed not to be responsible. See
7 48 C.F.R. § 9.406. Debarment is governed by policies and
8 procedures set out in the FAR, which provides, "Agencies shall
9 establish procedures for the prompt reporting, investigation, and
10 referral to the debarring official of matters appropriate for that
11 official's consideration." 48 C.F.R. § 9.406-3(a).

12 Agencies are required to issue notices of proposed debarment
13 and to allow the contractor, within thirty days after receipt of
14 the notice, to "submit, in person, in writing, or through a
15 representative, information and argument in opposition to the
16 proposed debarment." 48 C.F.R. § 9.406-3(c). The FAR requires a
17 decision within thirty working days after receipt of the
18 contractor's response in "actions based upon a conviction or
19 judgment, or in which there is no genuine dispute over material
20 facts." 48 C.F.R. § 9.406-3(d)(1). There is no specified
21 deadline for decisions in cases in which there are disputed
22 material facts. See 48 C.F.R. §§ 9.406-3(d)(2), (3). The FAR
23 provides for "prompt notice" once the debarring official makes a
24 final determination on the proposed debarment. 48 C.F.R. § 9.406-
25 3(e).

26 The General Services Administration (GSA) maintains "the web-
27 based Excluded Parties List System (EPLS)," which includes "all
28 contractors debarred, suspended [or] proposed for debarment . . .

1 ." 48 C.F.R. § 9.404(a), (b)(1). "Contractors debarred,
2 suspended, or proposed for debarment are excluded from receiving
3 contracts, and agencies shall not solicit offers from, award
4 contracts to, or consent to subcontracts with these contractors
5 unless the agency head determines that there is a compelling
6 reason for such action." 48 C.F.R. § 9.405(a).

7 II. Factual Background

8 From December 2000 through March 2007, Plaintiff was an
9 employee of the Navy at the Naval Postgraduate School. 1AC at ¶
10 42. During the time of his employment, Plaintiff was involved in
11 a research project called the Open Market Corridor (OMC) for which
12 he was given authority to be an ordering officer for supplies and
13 services under a contract with the Department of the Interior.

14 1AC ¶¶ 48-54. Beginning in August 2005, both OMC and the contract
15 with the Department of the Interior were audited by the Department
16 of Defense Inspector General (DOD/IG). 1AC

17 ¶ 71. In January 2006, the DOD/IG released its preliminary
18 findings and referred OMC to the Navy's Acquisition Integrity
19 Office (AIO). 1AC ¶ 72. The Navy's Debarring Official at the AIO
20 coordinated investigations with other Navy agencies. 1AC ¶ 76.

21 In January 2007, the DOD/IG released its final audit report.
22 1AC ¶ 86. On October 14, 2010, the DOD/IG issued its proposed
23 debarment of Plaintiff. 1AC ¶ 109. While the debarment was
24 pending, Plaintiff was added to the Excluded Parties List System
25 (EPLS) as proposed for debarment. Declaration of Claire Cormier
26 at Exs. B, E. On December 14, 2010, Plaintiff's counsel provided
27 his opposition to the proposed debarment. 1AC ¶ 114.

1 On November 4, 2011, Plaintiff filed the instant suit under
2 the Administrative Procedures Act (APA). Plaintiff sought an
3 order enjoining the proposed debarment decision, compelling the
4 Navy to issue a final debarment decision, and enjoining the final
5 debarment decision. Original Complaint at ¶ 281. In addition,
6 Plaintiff sought attorneys' fees and costs pursuant to the Equal
7 Access to Justice Act (EAJA). Id.

8 On March 2, 2012, the Navy issued its final decision
9 terminating the proposed debarment and finding Plaintiff and his
10 affiliated companies to be "presently responsible to contract with
11 the Government." 1AC ¶ 136. Plaintiff and his affiliated
12 companies were removed from the active EPLS. Declaration of Josie
13 Dristy at ¶ 3.

14 Plaintiff filed his 1AC on April 25, 2012, again alleging
15 claims under the APA. The amended complaint includes additional
16 allegations regarding the bad faith of various Navy employees in
17 bringing and investigating the audits leading to the proposed
18 debarment, and allegations of ongoing harm Plaintiff has
19 experienced because of the audits and proposed debarment. See 1AC
20 ¶¶ 244-320.

21 Plaintiff now seeks declaratory judgment and injunctive
22 relief. He asks that the Court declare that (1) the proposed
23 debarment was not factually or legally justified or substantiated,
24 (2) Defendants violated the procedural requirements for debarment,
25 (3) the audits upon which the proposed debarment were based were
26 conducted in bad faith, (4) the audits made incorrect
27 determinations of law, (5) Defendants' final termination of the
28 proposed debarment was unreasonably delayed in violation of

1 regulations and due process, and (6) the audits and debarment
2 violated Plaintiff's due process rights and infringed on his
3 liberty interests. 1AC ¶ 331. In addition, Plaintiff requests
4 that the Court enter an injunction requiring that Defendants
5 remove information about the proposed debarment from the archival
6 section of the EPLS and expunge any evidence that debarment was
7 ever proposed. 1AC ¶ 332. In addition Plaintiff seeks an
8 injunction prohibiting Defendants from "communicat[ing] negatively
9 to other federal government personnel" regarding the audits and
10 other information underlying the proposed debarment. Id.
11 Finally, Plaintiff renews his claim for attorneys' fees and costs
12 pursuant to the EAJA.

13 Defendants move pursuant to Federal Rule of Civil Procedure
14 12(b)(1) to dismiss the 1AC for lack of subject matter
15 jurisdiction.

16 LEGAL STANDARD

17 Subject matter jurisdiction is a threshold issue which goes
18 to the power of the court to hear the case. A federal court is
19 presumed to lack subject matter jurisdiction until the contrary
20 affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873
21 F.2d 1221, 1225 (9th Cir. 1989).

22 Dismissal is appropriate under Rule 12(b)(1) when the
23 district court lacks subject matter jurisdiction over the claim.
24 Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either
25 attack the sufficiency of the pleadings to establish federal
26 jurisdiction, or allege an actual lack of jurisdiction which
27 exists despite the formal sufficiency of the complaint. Thornhill
28 Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th

1 Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.
2 1987).

3 DISCUSSION

4 The APA provides, "A person suffering legal wrong because of
5 agency action, or adversely affected or aggrieved by agency action
6 within the meaning of a relevant statute, is entitled to judicial
7 review thereof." 5 U.S.C. § 702. Unless "made reviewable by
8 statute," only "final agency action[s] for which there is no other
9 adequate remedy in a court are subject to judicial review." 5
10 U.S.C. § 704.

11 Defendants argue that the Court lacks jurisdiction over
12 Plaintiff's APA claim because the final agency decision was not
13 adverse to him. It is undisputed that Defendants terminated the
14 proposed debarment and found Plaintiff to be "presently
15 responsible to contract with the Government." However, Plaintiff
16 argues that the proposed debarment was itself a final agency
17 decision subject to independent review under the APA.¹ In the
18 alternative, Plaintiff argues that the finality requirement of the
19 APA is satisfied with respect to the proposed debarment because he
20 makes claims related to Defendants' handling of the proposed
21 debarment. Plaintiff further argues that if the finality
22 requirement has not been satisfied, his claims are cognizable
23 under an "unreasonable delay" exception to the finality
24 requirement.

25
26 ¹ The Court notes that, in his papers, Plaintiff refers to
27 the proposed debarment as the "debarment" or the "initial
28 debarment." However, there was no debarment in this case. There
was only a proposed debarment which was ultimately terminated.

1 A. Final Agency Decision

2 Plaintiff first argues that the proposed debarment was itself
3 a final agency decision subject to review under the APA. In
4 Bennett v. Spear, the Supreme Court held that

5 two conditions must be satisfied for agency action to be
6 "final": First, the action must mark the consummation
7 of the agency's decisionmaking process--it must not be
8 of a merely tentative or interlocutory nature. And
9 second, the action must be one by which rights or
10 obligations have been determined, or from which legal
11 consequences will flow.

12 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted).

13 The Ninth Circuit has held that it "will not entertain a petition
14 where pending administrative proceedings or further agency action
15 might render the case moot and judicial review completely
16 unnecessary." Sierra Club v. U.S. Nuclear Regulatory Com'n, 825
17 F.2d 1356, 1362 (9th Cir. 1987).

18 The proposed debarment was not a final order determining
19 Plaintiff's ability to contract with the government. Indeed, the
20 proposed debarment invited Plaintiff to submit "information and
21 argument in opposition to the proposed debarment" in accordance
22 with the FAR. Administrative Record (AR) at 428. In issuing the
23 proposed debarment, the Navy clearly had not "rendered its last
24 word on the matter." Whitman v. Am. Trucking Ass'ns, 531 U.S.
25 457, 478 (2001) (quoting Harrison v. PPG Indus., Inc., 446 U.S.
26 578, 586 (1980)). The Navy did not make its final determination on
27 that issue until March 2, 2012 when it terminated the proposed
28 debarment, finding that Plaintiff had provided information
establishing that he was "presently responsible to contract with
the Government." AR at 609.

1 Plaintiff argues that the Bennett test should be applied in a
2 flexible manner that focuses on the practical and legal effects of
3 the action. However, the cases Plaintiff cites in support of that
4 argument are factually and legally distinguishable from the
5 current dispute. See, e.g., Abbott Laboratories v. Gardner, 387
6 U.S. 136, 151 (1967) (allowing pre-enforcement challenge to agency
7 regulation where the regulations were found to be "definitive"
8 statements of the agency's position and "immediate compliance with
9 their terms was expected."); and Oregon Natural Desert Assoc. v.
10 U.S. Forest Service, 465 F.3d 977, 984 (9th Cir. 2006) (holding
11 that the agency "arrived at a definitive position to allow grazing
12 [on certain land] and put that decision into effect by issuing
13 grazing permits"). Indeed, Plaintiff cites a case which provides
14 that, even where an agency decision "is a discrete decision that
15 has immediate financial impact, . . . the fact that a statement
16 may be definitive on some issue is insufficient to create a final
17 action subject to judicial review." Indus. Customers of NW Units
18 v. Bonneville Power Admin., 408 F.3d 638, 646 (9th Cir. 2005).

19 The proposed debarment was not a final agency decision, and
20 accordingly is not subject to judicial review under the APA. See
21 5 U.S.C. § 704.

22 B. Challenge to Defendants' Handling of the Proposed
23 Debarment

24 Plaintiff next argues that the finality requirement of the
25 APA is satisfied because he claims that Defendants violated
26 various regulations or his constitutional rights when they issued
27 the proposed debarment. However, the only case Plaintiff cites in
28 support of this proposition is a case from the Southern District

of Ohio in which the plaintiff challenged a notice of proposed extension of debarment after he had already been debarred. Lasmer Industries, Inc. v. Defense Supply Center Columbus, 2008 WL 2457704 (S.D. Ohio). The case provides no authority for review of interim agency actions when the final agency action is favorable to the plaintiff. Indeed, one of the stated goals of the finality requirement is to avoid judicial review of interim agency actions which might be rendered moot by final agency decisions. See FTC v. Std. Oil Co., 449 U.S. 232, 244 n.11 (1980); see also, Peoples Nat'l Bank v. Office of the Comptroller, 362 F.3d 333, 337 (5th Cir. 2004) (noting that the potential for a favorable result for the plaintiff that would render its challenge to a regulation moot "indicates that [the party] should pursue its administrative appeal, not shortcut it by filing suit."); Boise Cascade Corp. v. FTC, 498 F. Supp. 772, 782 (D. Del. 1980) ("All preliminary and procedural agency rulings in a proceeding are 'insulated from review' if the final agency decision is not adverse to the private party. . . . The framers of the APA thus did not intend for rulings to be deemed 'final agency action' simply because they might otherwise escape judicial review.").

C. Unreasonable Delay Exception

Plaintiff next argues that even if the proposed debarment was not a final agency action, the Court has jurisdiction to review it under the unreasonable delay exception. Although the APA allows a court to "compel agency action unlawfully withheld or unreasonably delayed," there is no action to compel in this case. 5 U.S.C. § 706. The proposed debarment has already been terminated. The case Plaintiff cites in support of his argument is one in which

1 the party sought a writ of mandamus to force an agency to act on
2 its patent claims. Independence Mining Co. v. Babbitt, 105 F.3d
3 502 (9th Cir. 1997).

4 The only final agency action in this case is the termination
5 of the proposed debarment, which was resolved in Plaintiff's
6 favor. Accordingly, the Court lacks subject matter jurisdiction
7 over Plaintiff's claims, and need not reach Defendants' other
8 arguments regarding the substance of Plaintiff's claims or
9 Plaintiff's claim for attorneys' fees pursuant to the Equal Access
10 to Justice Act.

11 CONCLUSION

12 For the foregoing reasons, the Court GRANTS Defendants'
13 motion to dismiss. Docket No. 39. Because the Court lacks
14 subject matter jurisdiction over this action and Plaintiff cannot
15 cure this defect, the complaint is dismissed with prejudice. The
16 clerk shall enter judgment and close the file. Defendants shall
17 recover their costs from Plaintiff.

18 IT IS SO ORDERED.

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20 Dated: 1/29/2013

21 
22 CLAUDIA WILKEN
23 United States District Judge
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